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UNLIMITED JURISDICTION  
SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

WILLIAM TAYLOR,

Plaintiff,

vs.

CITY OF BURBANK, ET AL.,

Defendants.

CASE NO. BC422252

[Assigned to the Hon. John Wiley,  
Judge, Dept. "50"]

OPPOSITION TO DEFENDANT CITY  
OF BURBANK'S EX PARTE  
APPLICATION TO SEAL PITCHESS  
MOTIONS AND OPPOSITIONS AND  
REPLIES THERETO; DECLARATION  
OF CHRISTOPHER BRIZZOLARA

Date: August 30, 2010

Time: 8:30 a.m.

Dept.: 50

Action Filed: 9/22/09

TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD, AND TO THE  
CITY OF BURBANK:

PLEASE TAKE NOTICE that plaintiff William Taylor hereby presents the following  
opposition to Defendant City of Burbank's Ex Parte Application to Seal the Pitchess Motions and

9/30

1 oppositions and replies thereto regarding former and/or current BPD Lt. Jay Jette and BPD Lt. Eric  
2 Rosoff.

3 **I. STATEMENT OF FACTS**

4 On August 27, 2010, defendant City of Burbank presented an ex parte application for an  
5 order sealing the Pitchess motions of plaintiff and related documents regarding former and/or  
6 current BPD Lts. Jay Jette and Eric Rosoff. Plaintiff opposes this ex parte application, which is  
7 both substantively and procedurally unfounded.  
8

9 Defendant makes the unfounded claims that: "they (referring to the motions) plainly set  
10 forth information that plaintiff is claiming he acquired in his role as a manager in the Burbank  
11 Police Department.") In fact, the plaintiff's Pitchess motions do no such thing. In the Pitchess  
12 motions, counsel plaintiff presented declarations by counsel stating upon information and belief  
13 the various facts, events, and circumstances that support that good cause exists for the Court to  
14 order the production in camera of the requested law enforcement personnel records. As  
15 defendant is well aware, declarations by counsel made upon information and belief are the exact  
16 method which has repeatedly been approved by the California Supreme Court as the proper  
17 method of presenting to a trial court the facts, events, and circumstances in support of a Pitchess  
18 motion, and supporting that the trial court conduct an in camera inspection of law enforcement  
19 internal affairs and other personnel records to determine what records are relevant and should  
20 be produced to the party requesting the records.  
21

22 Under the statutory scheme, a party seeking discovery of a peace officer's personnel  
23 records must file a written motion describing the type of records sought, supported by "[a]ffidavits  
24 showing good cause for the discovery... , setting forth the materiality thereof to the subject matter  
25 involved in the pending litigation and stating upon reasonable belief that the governmental agency  
26 identified has the records or information from the records." (*Evidence Code* § 1043(b)(3).) This  
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1 initial burden is a "relatively relaxed standard." *City of Santa Cruz v. Municipal Court* (1989) 49  
2 Cal.3d 74, 84. Information is material as defined by *Evidence Code* § 1043(b)(3) if it 'will facilitate  
3 the ascertainment of the facts and a fair trial.' "[A] declaration by counsel on information and  
4 belief is sufficient to state facts to satisfy the 'materiality' component of that section." *Abatti v.*  
5 *Superior Court* (2003) 112 Cal.App.4th 39, 51.

6  
7 In *Santa Cruz v. Municipal Court, supra*, 49 Cal.3d 88 - 89, the California Supreme Court  
8 held that personal knowledge is not required by *Evidence Code* 1043(b) and that an affidavit on  
9 information and belief is sufficient. The Court found that in the context of Pitchess motions, the  
10 Legislature had expressly considered and rejected a requirement of personal knowledge. The  
11 Court held that the legislative history, the case law background, and the statutory language all  
12 point to the same conclusion: the "materiality" component of *Evidence Code* § 1043(b) may be  
13 satisfied by affidavits based on information and belief. (49 Cal.3d at 89.)

14  
15 In *Abatti v. Superior Court, supra*, 112 Cal.App.4th 39, the *Pitchess* motion contained an  
16 affidavit of counsel that related statements from other officers that the former officer had been  
17 asked to leave, and had been the subject of other complaints, and was labeled a "liability" problem  
18 for the department. *Id.* at 46-47. The court considered counsel's affidavit sufficient, even though  
19 it merely averred the contents of the counseling memos rather than stating with specificity the  
20 evidence which was contained therein. The court reasoned that to require such "specificity" in the  
21 Pitchess process would place the proponent of the motion in a "Catch-22" position of having to  
22 allege with particularity the very information he or she is seeking. *Id.* at 47, fn. 7.

23  
24 Further, any claims by defendant that the information relied upon by plaintiff's counsel in  
25 the declarations executed "upon information and belief" in support of these Pitchess motions  
26 came from plaintiff is rank speculation unsupported by any competent evidence. The misconduct  
27 of current and/or former BPD Lts. Jette and Rosoff has been the subject of numerous other  
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1 matters, including civil actions and other proceedings filed a number of other former BPD officers,  
2 has been the subject of investigations by outside law enforcement and/or other agencies, and has  
3 been the subject of numerous newspaper and other media articles detailing the corruption and  
4 misconduct rampant throughout the BPD. Thus, counsel for plaintiff had and has a fertile ground  
5 extending far beyond anything that plaintiff himself may or may not be aware of to support the  
6 declarations based upon "information and belief" in support of the instant Pitchess motions.  
7

8 Defendant also makes the unfounded allegation that: "plaintiff, does, among other things,  
9 disclose the existence of confidential personnel investigations in violation of Penal Code § 832.7."  
10 Again, plaintiff has done no such thing. Instead, plaintiff's counsel has alleged, upon information  
11 and belief, that the misconduct of Lts. Jette and Rosoff is believed to have been the subject of  
12 internal affairs investigations, as counsel for plaintiff is required to do in order to satisfy prong one  
13 of the Pitchess process. It is defendant itself, at p. 3, footnote 2 of its ill-conceived ex parte  
14 application, that has confirmed as a fact that such internal affairs investigations exist. In contrast  
15 to counsel for plaintiff, defendant City of Burbank does have actual knowledge of whether or not  
16 such internal affairs investigations exist, and has confirmed in its publically filed ex parte  
17 application (which notably it did not request to be sealed) that such internal affairs investigations  
18 do exist.  
19

20 Defendant has also made the unfounded and frankly scurrilous allegation that: "Plaintiff,  
21 through his attorneys and authorized agents, is planning to publically reveal alleged personnel  
22 information that he supposedly acquired in his role as a manager in the Burbank Police  
23 Department, thereby making that information readily available and accessible to members of the  
24 public." Instead, exactly the opposite is true. Plaintiff and his counsel have strictly complied with  
25 the requirements of *Evidence Code* Section 1043, and has not publically revealed, and does not  
26 intend to publically reveal, any alleged personnel information allegedly acquired by plaintiff in his  
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1 role as a manager in the Burbank Police Department. Had plaintiff or his counsel revealed and/or  
2 intended to publically reveal any such alleged personnel information, plaintiff and his counsel  
3 would not have filed the instant motions in the manner and format set forth in *Evidence Code*  
4 Section 1043. Defendant has failed to set forth a single instance where plaintiff or his counsel  
5 have "publically reveal[ed] alleged personnel information that he supposedly acquired in his role  
6 as a manager in the Burbank Police Department", and defendant's unfounded claim that plaintiff  
7 or his counsel intend to do so in the future is rank speculation unsupported by any competent  
8 evidence, and is in fact inconsistent with plaintiff and his counsel's adherence to the Pitchess  
9 procedures to date throughout this case.

11 **II. THE FAGAN CASE CITED BY DEFENDANT IS INAPPOSITE AND READILY**  
12 **DISTINGUISHABLE FROM THE INSTANT CASE**

13 In its ex parte application, defendant has relied almost exclusively on the case of *Fagan*  
14 v. *Superior Court* (2003) 111 Cal.App.4th 607 for its unfounded position that contents of a  
15 Pitchess motion based upon statements by counsel based upon information and belief, as  
16 opposed to the portions of a peace officer's personnel records actually ordered produced pursuant  
17 to Pitchess motion, should be sealed. A review of the facts underlying the *Fagan* case, and the  
18 issues therein, demonstrate unequivocally why the *Fagan* case is inapposite and provides no  
19 legitimate support for the defendant's instant ex parte application.

21 In *Fagan*, a deputy district attorney obtained the results of a urinalysis report regarding  
22 peace officers who had engaged in a street fight while off duty. The peace officers were ordered  
23 to provide urine samples to the San Francisco Police Department's Management Control Division  
24 for purposes of police internal affairs investigation and not as part of a criminal investigation. The  
25 results of the urinalysis tests were placed in the peace officer's personnel files. A grand jury  
26 subsequently returned indictments against the peace officers charging them with felony assault  
27 and battery. Following disclosure that the district attorney had obtained the urinalysis results from  
28

1 the peace officers' peace officer personnel files, the superior court, on the peace officer's motion,  
2 issued an interim protective order precluding public dissemination of those results. The peace  
3 officers also requested an order precluding the district attorney from releasing the urinalysis  
4 results on the grounds that those results were likely inadmissible and that release of them would  
5 prejudice their rights to a fair trial. The superior court rejected this argument on First Amendment  
6 grounds, which issue was not challenged by the peace officers at issue. The superior court also  
7 granted motions to intervene by members of the media who opposed the peace officers' motion.  
8 The superior court denied the peace officers' motion, and dissolved its interim protective order.  
9 After the Court of Appeal issued an order to show cause, the district attorney dismissed the  
10 criminal indictments and filed new criminal complaints against petitioners. The urinalysis results  
11 remained under seal in accordance with the superior court's interim protective order and the Court  
12 of Appeal's stay order.  
13

14 Thus, in the *Fagan* case, the deputy district attorney at issue obtained the peace officers'  
15 urinalysis results contained within their personnel records without first filing a Pitchess motion.  
16 The records that were ordered sealed were the peace office records that had been obtained  
17 without the filing of a Pitchess motion. Nowhere in the *Fagan* case did the Court of Appeal hold  
18 or indicate in any manner that a Pitchess motion seeking the discovery of the peace officer  
19 personnel records at issue therein should be ordered to be sealed, or that such a sealing order  
20 would in any manner be consistent with the Pitchess procedure.  
21

22 Indeed, exactly the opposite is true. The Court of Appeal in *Fagan* never held or implied  
23 that a Pitchess motion seeking the peace officer personnel records at issue therein should be filed  
24 under seal under any circumstances. The Court of Appeal instead stated that:  
25

26 Sections 832.7 and 832.8, along with Evidence Code sections 1043 and 1045, were  
27 enacted in 1978 to codify procedures for the discovery of peace officer personnel files.  
28 (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1037-1038 [130 Cal. Rptr. 2d 672, 63 P.3d 228].) "A party seeking disclosure must file a written motion .... The motion

1 must describe the type of records or information sought and provide affidavits  
2 showing good cause for the disclosure, setting forth its materiality to the pending  
3 litigation and stating on reasonable belief that the identified agency possesses the  
4 records or information .... The trial court must then make an in camera examination of  
5 the information produced by the agency and exclude from disclosure certain categories of  
6 information ...." ( *City of San Jose v. Superior Court*, *supra*, 5 Cal.4th at p. 52.) The party  
7 seeking disclosure must give notice of the motion to the custodian of the records,  
8 who in turn must immediately notify the officer whose records are sought. (Evid.  
Code, § 1043, subd. (a).) "The statutory scheme carefully balances two directly  
conflicting interests: the peace officer's just claim to confidentiality, and the criminal  
defendant's equally compelling interest in all information pertaining to the defense." ( *City  
of San Jose v. Superior Court*, *supra*, 5 Cal.4th at p. 53, [19 Cal.Rptr.2d 73, 850 P.2d  
621].) (Emphasis added.)

9 Thus, the *Fagan* court specifically cited with approval authority that a party seeking peace  
10 officer personnel records must: a) "file a written motion ... describ[ing] the type of records or  
11 information sought and provide affidavits showing good cause for the disclosure, setting forth its  
12 materiality to the pending litigation and stating on reasonable belief that the identified agency  
13 possesses the records or information"; and b) "give notice of the motion to the custodian of the  
14 records, who in turn must immediately notify the officer whose records are sought." Nowhere  
15 does the Court of Appeal hold or otherwise indicate that the party seeking the peace officer  
16 personnel records is required to file the written Pitchess motion under seal, or provide notice of  
17 the motion to the custodian of the records in some secret or confidential manner.  
18

19 Further, in enacting *Evidence Code* Sections 1043, the California Legislature specifically  
20 set forth that:

21 § 1043. Discovery or disclosure of peace officer's personnel records

22 (a) In any case in which discovery or disclosure is sought of peace or custodial officer  
23 personnel records or records maintained pursuant to Section 832.5 of the Penal Code or  
24 information from those records, the party seeking the discovery or disclosure shall file  
25 a written motion with the appropriate court or administrative body upon written  
26 notice to the governmental agency which has custody and control of the records.  
27 The written notice shall be given at the times prescribed by subdivision (b) of  
28 Section 1005 of the Code of Civil Procedure. Upon receipt of the notice the  
governmental agency served shall immediately notify the individual whose records are  
sought.

1       (b)    The motion shall include all of the following:

2       (1)    Identification of the proceeding in which discovery or disclosure is sought,  
3       the party seeking discovery or disclosure, the peace or custodial officer whose  
4       records are sought, the governmental agency which has custody and control of the  
5       records, and the time and place at which the motion for discovery or disclosure shall  
6       be heard.

7       (2)    A description of the type of records or information sought.

8       (3)    Affidavits showing good cause for the discovery or disclosure sought, setting  
9       forth the materiality thereof to the subject matter involved in the pending litigation  
10      and stating upon reasonable belief that the governmental agency identified has the  
11      records or information from the records.

12      © No hearing upon a motion for discovery or disclosure shall be held without full  
13      compliance with the notice provisions of this section except upon a showing by the moving  
14      party of good cause for noncompliance, or upon a waiver of the hearing by the  
15      governmental agency identified as having the records. (Emphasis added.)

16      Nowhere in *Evidence Code* Section 1043 does the Legislature require or indicate in any  
17      manner that a Pitchess motion should be filed under seal, or that some secret or confidential  
18      manner should be utilized for serving the motion upon the custodian of records of the peace  
19      officer personnel records at issue. Instead, the Legislature has unequivocally indicated that a  
20      Pitchess motion, and all of the information required to be presented therein, including the  
21      affidavits in support of the motion, "shall be file[d] with the with the appropriate court ... upon  
22      written notice to the governmental agency which has custody and control of the records, and that  
23      "the written notice shall be given at the times prescribed by subdivision (b) of Section 1005 of the  
24      Code of Civil Procedure."

25      Thus, the Legislature has specifically stated that a Pitchess motion is to filed and served  
26      in the exact same manner as any other motion, with the sole difference being that the motion is  
27      also required to be served upon the governmental agency which has custody and control of the  
28      records being sought. Had the Legislature intended that such Pitchess motions be filed under  
seal, it would have specifically included that requirement in *Evidence Code* Section 1043.



1 Indeed, defendant has failed to cite a single case in which a court has ever held or required  
2 that a Pitchess motion be filed under seal. Instead, the cases cited in the annotations of *Evidence*  
3 *Code* Section 1043 all involve cases in which the Pitchess motions and all supporting documents  
4 in regard thereto, including the declarations of counsel and others submitted therewith, were  
5 publically filed with numerous different courts, and none of which were filed under seal.  
6

7 Thus, defendant's ex parte application to require the instant Pitchess motions be filed  
8 under seal is in direct conflict with the content of *Evidence Code* Section 1043, the Legislature's  
9 intent in regard thereto, and the interpretation and application by courts of the provisions of  
10 *Evidence Code* Section 1043 to countless criminal and civil cases. As such, defendant's request  
11 should be summarily denied.

12 **III. CALIFORNIA RULES OF COURT RULE 2.550, ET SEQ. DOES NOT SUPPORT THAT**  
13 **THE INSTANT PITCHESS MOTIONS SHOULD BE SEALED, AND IN FACT SUPPORTS**  
14 **THAT THE MOTIONS SHOULD NOT BE SEALED**

15 *California Rules of Court* Rule 2.550 provides as follows:

16 **"(a) Application**

17 **(1) Rules 2.550-2.551 apply to records sealed or proposed to be sealed by court order.**

18 **(2) These rules do not apply to records that are required to be kept confidential by law.**

19 **(3) These rules do not apply to discovery motions and records filed or lodged in**  
20 **connection with discovery motions or proceedings. However, the rules do apply to**  
21 **discovery materials that are used at trial or submitted as a basis for adjudication of**  
22 **matters other than discovery motions or proceedings.**

23 **(b) Definitions**

24 **As used in this chapter:**

25 **(1) "Record." Unless the context indicates otherwise, "record" means all or a portion of**  
26 **any document, paper, exhibit, transcript, or other thing filed or lodged with the court.**

27 **(2) "Sealed." A "sealed" record is a record that by court order is not open to inspection**  
28 **by the public.**

**(3) "Lodged." A "lodged" record is a record that is temporarily placed or deposited with**  
**the court, but not filed.**

1 c) Court records presumed to be open.  
2 Unless confidentiality is required by law, court records are presumed to be open.

3 (d) Express factual findings required to seal records

4 The court may order that a record be filed under seal only if it expressly finds  
5 facts that establish:

6 (1) There exists an overriding interest that overcomes the right of public access  
7 to the record;

8 (2) The overriding interest supports sealing the record;

9 (3) A substantial probability exists that the overriding interest will be prejudiced  
10 if the record is not sealed;

11 (4) The proposed sealing is narrowly tailored; and

12 (5) No less restrictive means exist to achieve the overriding interest.

13 (e) Content and scope of the order

14 (1) An order sealing the record must:

15 (A) Specifically state the facts that support the findings; and

16 (B) Direct the sealing of only those documents and pages, or, if reasonably practicable,  
17 portions of those documents and pages, that contain the material that needs to be placed  
18 under seal. All other portions of each document or page must be included in the public file.

19 (2) Consistent with Code of Civil Procedure sections 639 and 645.1, if the records that  
20 a party is requesting be placed under seal are voluminous, the court may appoint a referee  
21 and fix and allocate the referee's fees among the parties." (Emphasis added.)

22 First, defendant utterly ignores and fails to address CRC Rule 2.550(a)(3) which specifically  
23 provides that in pertinent part that:

24 "These rules (regarding sealing of court records) do not apply to discovery motions  
25 and records filed or lodged in connection with discovery motions or proceedings."

26 The California Supreme Court has also noted that the sealed records rules do not apply  
27 to discovery proceedings, motions, and materials that are not used at trial or submitted to the  
28 court as a basis for adjudication. (See *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999))

1 20 Cal.4th 1178, 1208-1209, fn. 25.) Numerous other court have determined that the sealing of  
2 court records is discouraged, and have denied requests to seal court records. *H.B. Fuller Co. v.*  
3 *Doe* (2007) 151 Cal.App.4th 879; *Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97;  
4 *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273; *Moore v. Superior*  
5 *Court* (2004) 117 Cal.App.4th 401.

6  
7 Here, the instant Pitchess motions are specifically discovery motions and/or records filed  
8 or lodged in connection with discovery motions or proceedings. In fact, the motions are  
9 specifically entitled: "Motions for Discovery of Peace Officer Personnel Records" of the peace  
10 officers at issue. Thus, the Legislature and the Judicial Council have specifically excluded these  
11 types of motions (i.e., discovery motions) from the ambit of CRC Rule 2.550. As such,  
12 defendant's request to seal these motions, and any records filed or lodged in connection with  
13 these discovery motions or proceedings, should be summarily rejected.

14  
15 Further, CRC Rule 2.550© specifically provides that there is a presumption that all court  
16 records are open "unless confidentiality is required by law." Here, no law requires that Pitchess  
17 motions or any records filed or lodged therewith are required to be confidential. In fact, as set  
18 forth above, exactly the opposite is true - the Legislature has required pursuant to *Evidence Code*  
19 *Section 1043* that such motions be filed with the court, and thus, are presumed to be open to the  
20 public.

21  
22 Additionally, CRC Rule 2.550(d) requires that in order to seal court records, the Court must  
23 expressly find facts that establish that: (1) there exists an overriding interest that overcomes the  
24 right of public access to the record; (2) the overriding interest supports sealing the record; (3) a  
25 substantial probability exists that the overriding interest will be prejudiced if the record is not  
26 sealed; (4) the proposed sealing is narrowly tailored; and (5) no less restrictive means exist to  
27 achieve the overriding interest.

1 Here, defendant has failed to set forth any competent evidence supporting that an  
2 overriding interest exists to seal the Pitchess motions and supporting documents at issue.  
3 Instead, exactly the opposite is true. Every day in Los Angeles County and across the State of  
4 California Pitchess motions are filed on behalf of criminal defendants and civil litigants seeking  
5 peace officer personnel records. None of those motions are filed under seal, and no statutory or  
6 case authority requires that such motions be filed under seal. Defendant has failed to set forth  
7 any facts supporting that there is a greater interest that supports the sealing of the instant  
8 Pitchess motions than any of the thousands of other Pitchess motions filed across the State of  
9 California seeking similar peace officer personnel records regarding misconduct of peace officers,  
10 including prior use of excessive force, sexual misbehavior, dishonesty, criminal behavior, and  
11 other such misconduct which is regularly the subject of Pitchess motions. The facts that the  
12 Burbank officers at issue are believed to have committed acts of sexual harassment, burglary, and  
13 other misconduct does not entitle them to any special treatment as compared to any of the  
14 thousands of other peace officers across the State of California whose records are sought via  
15 Pitchess motions , and does provide them with any "overriding interest" in sealing the Pitchess  
16 motions at issue.  
17  
18

19 Further, defendant has failed to set forth any competent evidence supporting that any  
20 overriding interest would be prejudiced if the Pitchess motions are not sealed. First, there is no  
21 overriding interest to be prejudiced. Second, defendant has failed to set forth what prejudice, if  
22 any, would occur if the Pitchess records are not sealed. The fact that counsel has alleged on  
23 information and belief that certain records are believed to exist regarding these officers is no  
24 different that parties or their counsel alleging in a lawsuit that a defendant engaged in acts of  
25 misconduct. Taking defendant's argument to its logical conclusion, every lawsuit alleging that a  
26  
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1 peace officer engaged in misconduct would have to be filed under seal, an absurd result which  
2 is unsupported by any authority or by common sense.

3 Further, any records ordered by the Court to be produced by defendant pursuant to the  
4 Pitchess motions at issue are expected to be produced pursuant to protective orders. Thus, there  
5 is a less restrictive means which exists to preserve the alleged confidentiality of the requested  
6 records and information - the issuance of a protective order regarding the information and  
7 documents produced pursuant to these motions, which is the exact means approved by the  
8 Legislature in *Evidence Code* Section 1045(e), which provides that:  
9

10 "The court shall, in any case or proceeding permitting the disclosure or discovery of any  
11 peace or custodial officer records requested pursuant to Section 1043, order that the  
12 records disclosed or discovered may not be used for any purpose other than a court  
proceeding pursuant to applicable law."

13 Therefore, the Legislature itself has set forth a less restrictive means than sealing Pitchess  
14 motions to preserve the alleged confidentiality of the requested records and information, and  
15 defendant's request to seal the Pitchess motions themselves, rather than the records disclosed  
16 or discovered pursuant thereto, is completely unnecessary.

17 **IV. CONCLUSION**

18 The instant ex parte application should be denied in its entirety.

19 Dated: 8/29/10

20  
21 By: \_\_\_\_\_



22 Gregory W. Smith  
23 Christopher Brizzolara  
24 Attorneys for Plaintiff  
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